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“CURST BE HE THAT MOVES MY BONES:”
THE SURPRISINGLY CONTROLLING ROLE OF RELIGION IN
EQUITABLE DISINTERMENT DECISIONS

PETER ZABLOTSKY**

I. INTRODUCTION

At least since the nineteenth century, the courts in the United States have had to decide cases involving disinterment.¹ The challenges posed by this task have been continuous, with disputes over the remains of slain civil rights era victim Emmett Till and the remains of soldiers killed in Iraq providing the most recent, trying contexts.² The circumstances surrounding these private disputes are difficult, heart wrenching, and compelling—a bitter conflict arises among grieving surviving family members;³ or, a conflict between some family members on the one hand, and the beliefs of a decedent who was a devout follower of a religion, supported by the representatives of the consecrated ground of that religion, on the other.⁴

As there are no ecclesiastical courts in the United States, one might expect that disinterment disputes—at least in those instances in which the decedent failed to execute the relevant legally controlling document—would be resolved in equity based upon the interests of the feuding next-of-kin; and in fact, in cases in which religion is not a factor, this is precisely what has happened.⁵ Surprisingly, however, in cases in which religion is relevant, it has assumed a controlling role. In these cases, religious concerns permeate every aspect of the analysis, and trump the equities that

*Imprecation on Shakespeare’s Tomb at Stratford, England.

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1. See R.F. Martin, Annotation, *Removal and Reinterment of Remains*, 21 A.L.R.2d 472 (2004) [hereinafter *Removal and Reinterment*] (discussing early cases involving disinterment).

2. Gretchen Ruethling, *Kin Disagree on Exhumation of Emmett Till*, N.Y. TIMES, May 6, 2005 at A23; Dean E. Murphy & Carolyn Marshall, *Family Feuds Over Soldier’s Remains*, N.Y. TIMES, Oct. 12, 2005, at A14.

3. See, e.g., *Removal and Reinterment*, *supra* note 1, at 474; Heather Conway, *Dead, But Not Buried: Bodies, Burial and Family Conflicts*, 23 LEGAL STUD. 423, 423-24 (2003).

4. See *Removal and Reinterment*, *supra* note 1, §§ 11, 14, 15 (providing discussions on religious considerations, conflict between spouse and blood relations or cemeteries or religious architecture, and conflict among blood relations, or between them and the cemetery or religious authorities); see also Kieron McEvoy & Heather Conway, *The Dead, the Law, and the Politics of the Past*, 31 J. L. & SOCIETY 539, 540 (2004) (discussing cultural and political conflicts relating to dead bodies).

5. See *supra* text accompanying note 3 (considering private disputes regarding disinterment).

normally operate in favor of the next-of-kin. Indeed, a review of the relevant authorities appears to compel a universally applicable conclusion, *to wit*, while the circumstances of the disputes surrounding disinterment are difficult and varied, there is at least, unity in result. The courts have refused to allow disinterment in every case involving a decedent who showed by his actions that he was devoted to his religion, whose remains were interred in the consecrated ground of his religion, and whose disinterment was prohibited by the beliefs and practices of his religion. Put another way, there are no cases in which a court has allowed disinterment at the behest of a surviving family member when the decedent was religious, interred in the consecrated ground of that religion, and the belief system of that religion forbade disinterment.⁶

This article examines and analyzes the controlling role religion has assumed in disinterment cases. After briefly reviewing some general background material, the article turns to a discussion of the role of religion in determining the wishes of the decedent. Next, the article examines the role of religious institutions when they inject themselves with the disinterment decision. Then, the article looks at the effect religion has on the public interest as it relates to disinterment generally, and statutes addressing disinterment, specifically. Finally, the article considers the impact of the Establishment Clause and the Free Exercise Clause on these religious oriented disinterment decisions.

II. BACKGROUND

Without exception, disputes regarding disinterment are decided, ostensibly, by well-settled, decades old equitable considerations. More generally, state courts in the United States have long held that there is a strong presumption against disinterment,⁷ going so far as to limit the act to a “rare emergency”⁸ or “circumstances of extreme exigency,”⁹ and require a showing of “strong and convincing evidence.”¹⁰

6. See, e.g., *Mitty v. Oliveira*, 244 P.2d 921, 929 (Cal. Dist. Ct. App. 1952); *Friedman v. Gomel Cheshed Hebrew Cemetery Ass'n*, 92 A.2d 117, 119-20 (N.J. Super. Ct. Ch. Div. 1952); *Dutcher v. Paradise*, 217 A.D.2d 774, 775 (N.Y. App. Div. 1995); *Goldman v. Mollen*, 191 S.E. 627, 634-35 (Va. 1937); *Ingraffia v. Dougherty*, 29 North. Co. R. 294 (Pa. 1944); *Seifer v. Schwimmer*, 1 N.Y.S.2d 730, 733 (N.Y. Sup. Ct. 1937); *Klahr v. Nadel*, 1 N.Y.S.2d 733, 734-35 (N.Y. App. Div. 1937); *In re Weinstein*, 277 N.Y.S. 425, 425-26 (N.Y. App. Div. 1935); *Datz v. Dougherty*, 41 Pa. D. & C. 505, 515-16 (1941).

7. See, e.g., *Maffei v. Woodlawn Memorial Park*, 130 Cal. App. 4th 119, 130 (Cal. Dist. Ct. App. 2005).

8. *Mitty*, 244 P.2d at 926.

9. *Zablutower v. Mt. Zion Cemetery*, 413 N.Y.S.2d 106, 107 (N.Y. Sup. Ct. 1979) (citing *Grinnan v. Fredericksburg Lodge*, 88 S.E. 79 (Va. 1916)).

10. *Maffei*, 130 Cal. App. 4th at 126.

As summed up by one commentator:

Despite the inconsistencies with which American cases on exhumation and removal of remains are rife, to this extent they all agree in principle: The normal treatment of a corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a “right” of the dead and a charge on the quick. Neither the ecclesiastical, common, nor civil system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes compelling, reasons. Securing “unbroken final repose” has been the object of both civil and criminal legislation.¹¹

In those instances in which applications are considered, the factors relevant to a decision regarding the disinterment of a decedent are: (1) the wishes of the decedent; (2) the interest of the public; (3) the rights and feelings of those entitled to be heard by reason of relationship or association; and, (4) the rights and principles of the religious body which granted the right to inter at the first place of burial.¹²

As articulated, these are neutral factors; in cases with respect to which religion is not relevant, they are applied in a neutral fashion. However, for those cases with respect to which religion is relevant, three of the four factors are applied in a way that elevates religion to a controlling role in the disinterment decision. It is to a discussion of the impact of religion on the articulated equitable factors that this article now turns.

III. THE DOMINANT, INDEED CONTROLLING, ROLE OF RELIGION

A. WHEN A DECEDENT HAS LIVED HIS ADULT LIFE AS A DEVOTED MEMBER OF A RELIGION PROHIBITING DISINTERMENT, THE COURTS ARE UNANIMOUS IN CONCLUDING THAT THE DECEDENT WOULD NOT WISH TO BE DISINTERRED

As stated above, when applications for disinterment are considered, one of the critical factors relevant to the analysis is the decedent’s wishes expressed in his or her lifetime.¹³ While only two courts have specifically

11. *Removal and Reinterment*, *supra* note 1, at 476.

12. The authorities in support of the application of these factors are legion. *See, e.g., id.* at § 2(a); 22 AM. JUR. 2D *Dead Bodies* § 67 (2007).

13. *See supra* text accompanying note 12.

stated that they consider this factor to be the most significant,¹⁴ the fact is that when a case involves a religious decedent, virtually all courts have treated this factor with special deference; they have, in virtually every published opinion, treated the decedent's "wishes" and religious beliefs as one in the same. In case after case, the courts have concluded that a religiously devoted decedent would wish the tenets of his religion to remain applicable in death, and that a decedent devoted to a religion prohibiting disinterment would not wish to be disinterred; as a result, they have categorically refused to allow disinterment. In so holding, those courts have not relied on any particular statement—ambiguous, clear or otherwise—of the deceased, but instead looked to the presence of a lifetime of religious devotion.¹⁵

One of the first cases to apply this line of reasoning and proceed under these assumptions was *In re Donn*,¹⁶ where the surviving children sought to disinter the remains of their deceased mother and remove the remains to a family plot.¹⁷ The mother had been a practicing Roman Catholic all her life, and, pursuant to her request buried in a Roman Catholic cemetery.¹⁸ In denying the petition for removal, the court put the greatest emphasis on the decedent's wishes, and determined her wishes by examining her religious devotion.¹⁹ Specifically, the court first reviewed church law regarding disinterment, stating that the cemetery was under the rules and regulations of the Roman Catholic Church, that its grounds, pursuant to the rites and canons of the Roman Catholic Church, had been consecrated to the burial of the members thereof, and that the rules and canons of the Church forbade the removal of bodies buried in consecrated grounds.²⁰ The court concluded that religious devotion was the ultimate determinant of the decedent's wishes, stating:

14. See *Mitty v. Olivera*, 244 P.2d 921, 926-27 (Cal. Dist. Ct. App. 1952); *Cordts v. Cordts*, 118 P.2d 556, 558 (Kan. 1941) ("Speaking generally, perhaps primary importance is given to the wishes of the deceased.").

15. *Removal and Reinterment*, *supra* note 1, at 498. One thing the court seems to actually be doing is to divine the wishes of the deceased; and if he were a staunch adherent of a given church, it may be presumed that his wishes were that his remains should be treated in accordance with its rules. Similarly, "[t]here is a presumption that, if the decedent was a devout member of a religious organization whose principles were opposed to the disturbance of sepulcher, the decedent would wish his or her remains to be treated in accordance with the rules of that religion." *Dead Bodies*, *supra* note 12, § 67.

16. 14 N.Y.S. 189 (N.Y. Sup. Ct. 1891).

17. *In re Donn*, 14 N.Y.S. at 189.

18. *Id.*

19. *Id.* at 190.

20. *Id.* at 189.

There is, however, another and a more serious question. The deceased was a member of a Roman Catholic Church. I assume that she entertained the views in reference to her burial common to the members of that body, and that she believed that her welfare after death depended to some extent upon whether her body was interred in ground consecrated by her church.²¹

*Goldman v. Mollen*²² followed *In re Donn*. In *Goldman*, the children of a deceased father sought to disinter his remains from an Orthodox Jewish cemetery, and remove them to a Reformed Jewish cemetery so the remains could rest next to the remains of his deceased wife and the children's mother.²³ The court devoted much of its opinion to establishing that, while the decedent never clearly stated where he wanted to be buried, his devotion to his religion was critical proof of his wishes.²⁴ The court began its analysis by stating that while it was true that the decedent "did not expressly state to anyone . . . where he desired to be buried, . . . he was [nonetheless] an [O]rthodox Jew and was a member, officer and priest in his synagogue."²⁵ From this, the court concluded "that h[is] desir[ing] that his body . . . be dealt with according to the tenets of his faith was an inevitable conclusion,"²⁶ and that his "whole life is an impressive expression of his will."²⁷ The court expanded and commented upon the breadth of its reasoning, stating:

We do not doubt that a devout Catholic would wish to be buried in consecrated ground and would object to his body being taken from such a place and put in a Protestant cemetery, and we do not doubt that a Bombay Parsee would wish to come to final rest on Malabar Hill. These are among the things we know without being told.²⁸

The court then found that disinterment violated the tenets of Orthodox Judaism and denied the petition for disinterment, concluding that "the wishes of the deceased, particularly when their origin rests on matters of faith, are not to be overlooked," and that "[t]he faith of those surviving might change but the wishes of the dead are irrevocable."²⁹

21. *Id.* at 190.

22. 191 S.E. 627 (Va. 1937).

23. *Goldman*, 191 S.E. at 628.

24. *Id.* at 634-35.

25. *Id.* at 631.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 633.

Subsequently, in *Ingraffia v. Dougherty*,³⁰ the court stated its views in language still more profound. *Ingraffia* involved a wife who sought to remove the remains of her deceased husband from a Roman Catholic cemetery to a non-Catholic cemetery.³¹ The church authorities opposed the widow because disinterment under such circumstances violated canon law. In denying the widow the right to disinter, the court relied almost exclusively on the fact that the decedent had been a devout Catholic, and that even though he never stated a preference regarding his burial, such devotion created a “compelling influence” regarding his wishes.³² On this latter point, the court stated:

While [the decedent] did not by will or otherwise state his desire as to burial, his continued adherence during his life to the Catholic faith raises the compelling inference that he desired interment in consecrated ground in accordance with the canons, rules and regulations of the Catholic Church. Due regard for the religious faith of [the decedent] requires us to keep inviolate that faith even in his last repose.³³

Then, in language that indicated the depth of the court’s feeling on the issue, the court intoned that “to deny to the dead the faith which sustained them in life is to deny to the living the faith that sustains them in death. In this sense the fundamental American ideal of religious freedom transcends the confines of the grave.”³⁴

A California decision, *Mitty v. Oliveira*,³⁵ epitomizes these principles, and accords ultimate respect to the wishes of the individual as manifest by religious devotion in life. In *Mitty*, a widow sought to disinter and cremate the remains of her deceased husband and sons, from a Roman Catholic cemetery.³⁶ The archbishop of the church opposed disinterment and cremation because the act violated Canon law.³⁷ The court first stated that, as a guiding legal principle, the wishes of the deceased were of “primary importance.”³⁸ Then, the court applied this principle, and determined what those wishes were, by relying, exclusively, on the fact that both the husband and

30. 29 North Co. R. 294 (Pa. 1944).

31. *Ingraffia*, 29 North Co. R. at 300.

32. *Id.*

33. *Id.*

34. *Id.*

35. 244 P.2d 921 (Cal. Dist. Ct. App. 1952).

36. *Mitty*, 244 P.2d at 924.

37. *Id.*

38. *Id.* at 926.

son had lived their lives as devout Roman Catholics.³⁹ Specifically, the court focused on the fact that the decedents “lived and died members of a church whose tenets placed great emphasis upon the importance of burial of its members in consecrated ground and proscribed the cremation of their remains;” and that, “[t]here is a presumption, from the very fact of their membership in that church, that [they] subscribed to those tenets and desired to be buried in compliance therewith.”⁴⁰ Based on the decedents’ wishes as manifest by their actions (religious devotion) when alive, and the tenets of the church to which they were devoted, the court denied the petition for disinterment.⁴¹

Other jurisdictions have handed down identical holdings in all manner of compelling circumstance. For example, in *Friedman v. Gomel Chesed Hebrew Cemetery Ass’n of Elizabeth*,⁴² a case in which the children of a deceased mother sought to disinter her remains from one religious cemetery to a family plot in another cemetery, the court again focused its analysis on the wishes of the decedent as manifest by her religious devotion.⁴³ Specifically, the court stressed that the decedent was a practitioner of the rules of the Orthodox Jewish faith, that she was a strict adherent to the dietary laws of that faith, and that this adherence was “a measure of the orthodoxy” of the decedent.⁴⁴ Based upon this adherence, the court assumed that the decedent’s wishes were made manifest by her religious devotion, stating: “She was in essence a practitioner or an adherent to the tenets of the [O]rthodox Jewish faith and I assume that it was with her approval that she was buried in consecrated ground, and that ‘the disinterment of the bodies buried in hallowed ground is not in accordance with rabbinical law.’”⁴⁵ After so assuming, the court concluded that to disturb the repose of the body of the decedent would be in violation of deeply held religious beliefs and would run counter to the wish of the deceased.⁴⁶ The court so held despite discussing as “praiseworthy and decorous” the

39. *Id.* at 926-27.

40. *Id.* at 926.

41. *Id.* at 927.

42. 92 A.2d 117 (N.J. Super. Ct. Ch. Div. 1952).

43. *Id.* at 118-19.

44. *Id.* at 118.

45. *Id.*

46. *Id.* at 119. The court also quoted Justice Cardozo as to the significance of the wishes of the religiously devoted, stating:

I do not think I could take a better guide than that of Justice Cardozo, and I quote: “The wish of the deceased, even though legal compulsion may not attach to it has at least a large significance. Especially is this so when the wish has its origin in intense religious feeling.”

Id. (quoting *Yome v. Gorman*, 152 N.E. 126, 128 (N.Y. 1926)).

feelings “of kinsmen near in blood to satisfy a longing that those united during life shall not be divided after death.”⁴⁷

Similarly, in *Dutcher v. Paradise*,⁴⁸ the decedent’s father sought to have his son’s remains disinterred from a Roman Catholic cemetery and removed to a family plot.⁴⁹ The court stated that, “[i]n great measure the resolution of this issue is governed by the wishes of the decedent,” but the parties presented statements attributed to the decedent that conflicted as to his wishes regarding his last resting place.⁵⁰ In resolving the conflict and denying the petition for disinterment, the court again considered religious devotion the ultimate determinant of the decedent’s wishes.⁵¹ Specifically, relying on the fact that the decedent had been a devout Roman Catholic, the court stated “that [the] decedent was a lay catechist, . . . which indicates that, in accordance with the tenets of his faith, he would undoubtedly prefer to be buried in St. Mary’s Cemetery, which has been consecrated by the Roman Catholic Church, rather than in the unconsecrated Prospect Hill Cemetery.”⁵²

As the foregoing cases illustrate, there have been a significant number of published opinions involving decedents who during their lifetimes were religiously devoted, but who never unambiguously, or sufficiently as a matter of law, expressed the wish that their remains rest undisturbed as proscribed by the tenets of their faith. In every such case, and in language that is often compelling, the courts have attached ultimate significance to, and drawn definitive assumptions from, the fact that the decedent led a religious life and have denied the next of kin the right to disinter.

B. THERE ARE NO REPORTED COMMON LAW CASES ALLOWING
DISINTERMENT OVER THE OBJECTIONS OF A CEMETERY
GOVERNED BY A RELIGIOUS DENOMINATION WHOSE RELIGIOUS
BELIEFS CLEARLY PROHIBIT DISINTERMENT

For over a century, the common law has dictated that the sanctity of consecrated ground be protected, and that disinterment from a religious cemetery controlled by the denomination that proscribes disinterment simply not be allowed in cases of purely private disputes.⁵³ From a narrow legal perspective, the protection from desecration by disinterment afforded

47. *Id.*

48. 629 N.Y.S.2d 501 (1995).

49. *Dutcher*, 629 N.Y.S.2d at 501.

50. *Id.* at 502.

51. *Id.*

52. *Id.*

53. See *infra* text accompanying notes 61-144.

consecrated ground is found among the factors that courts consider in disinterment cases generally. As stated previously, one of the factors articulated unanimously by the courts is “the rights and principles of the religious body or other institution, which granted the right to inter the body at the first place of burial.”⁵⁴ From a broader perspective, this factor is in some ways subsumed by the factors which seek to respect the beliefs of the religious individual, and in other ways is greater than the sum of those individual beliefs. *To wit*, if an individual believes that his remains must rest undisturbed so as to accomplish a divine purpose, then the religious authorities opposing disinterment are respecting and protecting the beliefs of the individual; in this way, considerations relevant to a religion generally are subsumed by the equitable factors related to the decedent’s wishes.⁵⁵ At the same time, requiring that the rights and beliefs of the religious denomination governing the place of interment be considered protects the tenets of the entire religious community to which the individual chose to belong. Considering the tenets of the relevant faith opposed to disinterment avoids shocking the religious feelings of the members of the affected religious community,⁵⁶ offending adherents of an entire faith,⁵⁷ and desecrating holy ground, along with all of the negative connotations that that implies.⁵⁸

Regardless of the perspective taken on this factor—be it to protect the beliefs of the decedent or to preserve the tenets of an entire faith—the end result is the same: no reported decision has ever sanctioned disinterment from sanctified ground when disinterment was opposed by the religion governing that ground. One of the seminal case applying this factor is *Mitty*.⁵⁹ On the issue of considering and respecting the tenets of the faith opposed to disinterment, the court began its analysis by observing that “frequently . . . the prohibitions of religious law . . . require attention.”⁶⁰ Then, in refusing to allow disinterment despite the compelling case made by the next of kin (mother), the court held: “The church, which controls this cemetery, withholds its consent. That withholding is neither whimsical nor unreasonable, we think, in view of the very tenets we have mentioned.”⁶¹

54. *Mitty v. Oliveira*, 244 P.2d 921, 926 (Cal. Dist. Ct. App. 1952) (quoting *Dead Bodies*, *supra* note 12, § 22); *In re Keck*, 171 P.2d 933, 936 (Cal. Dist. Ct. App. 1946).

55. *See Removal and Reinterment*, *supra* note 1, at 498.

56. *See, e.g., Seifer v. Schwimmer*, 1 N.Y.S.2d 730, 732-33 (N.Y. Sup. Ct. 1937).

57. *See, e.g., Klahr v. Nadel*, 1 N.Y.S.2d 733, 734 (N.Y. Sup. Ct. 1937).

58. *See, e.g., In re Weinstein*, 277 N.Y.S. 425, 425-26 (N.Y. App. Div. 1935).

59. *See supra* text accompanying notes 35-41.

60. *Mitty v. Oliveira*, 244 P.2d 924, 926 (Cal. Dist. Ct. App. 1952).

61. *Id.* at 927.

Finally, the court specifically “mentioned” those tenets in great detail, noting, *inter alia*, that: (1) “all rights of interment [and disinterment] in cemeteries of the Roman Catholic Church . . . have been and are regulated by and subject to the canons of the Church;” (2) “the canon law of the [C]hurch . . . has prohibited and still prohibits removal of bodies from any Roman Catholic cemetery for cremation;” (3) “all [Roman Catholic] cemeteries are blessed pursuant to prescribed rites of the church and regarded by all Roman Catholics in good standing as consecrated ground, and the removal of the remains of a Roman Catholic buried [in a Roman Catholic cemetery,] . . . for the purpose of cremation, is regarded as a profanation and desecration of the remains;” (4) “the cemeteries within any Archdiocese have been and are subject to certain rules and regulations prescribed by the Archbishop of that Archdiocese, . . . including [rules] which prohibit[] removal from such a cemetery of the body of any [C]atholic in good standing which has been interred therein;” and, (5) “all rights of interment have been and are subject to certain rules and regulations of the cemetery, including one which prohibits the removal of a body interred therein, without the written consent of the Archbishop of the . . . [relevant] Archdiocese or the Reverend Director of the cemeteries of [that] Archdiocese.”⁶²

The position taken by the *Mitty* court finds universal support from every other case involving ground sanctified by a religion which strictly prohibits disinterment. Thus, in *Friedman v. Agudath Achim North Shore Congregation*,⁶³ the court held that the surviving children who wished to have their parents reinterred in a family plot were not entitled to disinter the bodies of their parents from ground sanctified by Orthodox Judaism as codified in the Shulchan Oruch.⁶⁴ In declining to issue the injunction allowing disinterment despite the laudable reason proffered in support of disinterment, the court relied, *inter alia*, on the fact that disinterment was contrary to the tenets of the Orthodox Jewish religion and would offend the precepts of the congregation.⁶⁵ The court so held despite the fact that the decedents themselves, though Jewish, were not Orthodox.⁶⁶

In *Seifer v. Schwimmer*,⁶⁷ the court held that the surviving children who wished to reinter the remains of their father next to those of their mother were not entitled to disinter the father’s remains from ground sanctified by

62. *Id.* at 924.

63. 115 N.E.2d 553 (Ill. App. Ct. 1953).

64. *Friedman*, 115 N.E.2d at 557.

65. *Id.*

66. *Id.*

67. 1 N.Y.S.2d 730 (N.Y. Sup. Ct. 1937).

Orthodox Jewry.⁶⁸ In declining to issue an injunction allowing disinterment despite the laudable reasons proffered, the court relied upon the fact that disinterment would constitute a desecration of the sanctified burial ground, and would otherwise be regarded as a “horror” by Orthodox Jewry.⁶⁹

In *Klahr v. Nudel*,⁷⁰ the court held that the surviving children who wished to reinter the remains of their father in a family plot would not be allowed to disinter his remains from ground sanctified by Orthodox Jewry.⁷¹ As stated earlier, the court was extremely sensitive to the intentions of the children, noting the laudable wish of the family to place the body of their sire in a plot of their own,⁷² and stating that “[i]t is impossible to escape the natural desire to sympathize with the sentiments and hopes of the bereaved.”⁷³ Nevertheless, the court felt bound to uphold the tenet of Orthodox Jewry that prohibited disinterment. On this point, which commands the bulk of the court’s analysis, the court summed up its view by stating that while ecclesiastical law cannot control equity, it was “impossible to set at naught with heedlessness and indifference the traditions and rules of any religion, particularly so long established a creed as that of Jewry.”⁷⁴ The court so held even though disinterment may not have been against the decedent’s wishes.⁷⁵

In *In re Weinstein*,⁷⁶ the court reversed a trial court ruling that would have allowed a widow to disinter, from a Jewish cemetery, the remains of her husband so that they could be reinterred in a cemetery where she could ultimately be interred next to him.⁷⁷ In making its ruling, the court assumed not only that the widow’s motives were compelling and laudable, but also that she did not expressly consent to her husband’s burial in the cemetery.⁷⁸ Despite the compelling nature of both her motives and objections, the court seemed to be trying to minimize them, and, in turn, elevate the religious considerations. Specifically, the court justified its reversal primarily on the fact that the widow “attended the services proceeding the burial and also at

68. *Seifer*, 1 N.Y.S.2d at 733.

69. *Id.*

70. 1 N.Y.S.2d 733 (N.Y. Sup. Ct. 1937).

71. *Klahr*, 1 N.Y.S.2d at 735.

72. *Id.*

73. *Id.* at 734.

74. *Id.* at 735.

75. *Id.* In this sense, *Friedman* and *Klahr* may represent the ultimate in deference to the tenets of a religion, as these courts evaluated this consideration over both the wishes of the decedent (as assumed from their religious devotion) and the next-of-kin.

76. 277 N.Y.S. 425 (N.Y. App. Div. 1935).

77. *Weinstein*, 277 N.Y.S. at 425.

78. *Id.*

the interment,”⁷⁹ and that it appeared that the decedent was “buried in holy Jewish ground and that it is against the custom and violates the law and tenets of Hebrew faith to remove the remains of one who has been buried in a Jewish cemetery.”⁸⁰ Additionally, disinterment would “render the burial ground unholy and would result in other members of the defendant society refusing to be buried in the plot.”⁸¹

Finally, as discussed earlier, in *Ingraffia*,⁸² the court held that a widow could not disinter and remove remains of her deceased husband from a Roman Catholic cemetery to a nonsectarian one. In refusing to allow the disinterment the court stated that because the remains had been interred in ground consecrated by the Catholic Church, they could not be removed in violation of the canons of the Church.⁸³

It is significant that all of the reported cases prohibiting disinterment support the position of religious institutions whose beliefs prohibit such action. Equally significant is the fact that the cases allowing disinterment support these religious institutions as well; for, in every case in which disinterment was allowed, permission was granted only after a specific finding that disinterment did not violate the beliefs of the religion at issue.

Thus, in *Viscomi v. McGuire*,⁸⁴ the court held that an Episcopalian husband, over the objection of his sister-in-law, would be permitted to disinter the remains of his deceased wife, who had also been Episcopalian.⁸⁵ The court articulated and considered the same equitable factors as have been previously established; regarding those relating to religion and religiously sanctified ground, the court concluded that the cemetery “had no objection throughout and expresses its written consent to the . . . request [for disinterment],”⁸⁶ and that, “[n]o evidence is presented by the sister that . . . the Episcopalian faith . . . precludes disinterment or reburial.”⁸⁷

In *Petition of Davis*,⁸⁸ the court allowed a husband to disinter the remains of his wife over the opposition of a particular congregation, but only after finding that the opposition “was based on disputed and doubtful custom and usage of religious tenets” of the congregation owning the

79. *Id.*

80. *Id.* at 425-26.

81. *Id.* at 426.

82. *See supra* text accompanying notes 30-34.

83. *Id.*

84. 647 N.Y.S.2d 397 (N.Y. Sup. Ct. 1996).

85. *Viscomi*, 647 N.Y.S.2d at 401.

86. *Id.* at 398.

87. *Id.* at 400.

88. 192 N.Y.S.2d 174 (N.Y. Sup. Ct. 1959).

portion of the cemetery in which the decedent was buried.⁸⁹ More specifically, with respect to the beliefs of the particular congregation at issue, the court concluded that “[t]he particular custom and usage here involved is one on which even rabbinical authorities disagree,” and that some of the relevant rabbinical authorities believed that “disinterment and removal to a family plot is permissible.”⁹⁰

In *Application of Stanton*,⁹¹ a widow was allowed to disinter the remains of her deceased husband, but only after the court conclusively established that no good faith religious objection existed.⁹² Specifically, the court noted that the only religious objection was made not by a religious authority but by a domestic fraternal organization, and that the potentially relevant religious authorities were in conflict, and most tellingly, that the application was “opposed ostensibly on the ground that ‘Orthodox Jewish law provides that a grave once opened cannot be used for burial purposes for a period of seven years,’” but that the real reason, was that “someone . . . might seek to recover the moneys paid for the purchase of the grave.”⁹³

In *Application of Rosenwasser*,⁹⁴ the court allowed surviving children to disinter the remains of their deceased parents, but only after concluding that the congregation in control of the cemetery itself filed an affidavit stating that the relevant religion tenets were flexible, and that disinterment was permitted upon consent of designated ecclesiastical authority.⁹⁵ Absent such an affidavit, it seems unlikely that the court would have allowed disinterment; in dicta, the court stated: “[T]his Court is not in accord with violation of religious tenets.”⁹⁶

In several cases, the courts appeared to have admitted extensive testimony from religious organizations before allowing disinterment. Thus, in *Application of Baron*,⁹⁷ the court allowed a widow to disinter the remains of her deceased husband from a Jewish cemetery, but only after concluding that there was significant rabbinical support for allowing the disinterment.⁹⁸ The discussion of the relevant rabbinical views was particularly detailed. Found most persuasive by the court were the affidavits of Rabbi Harry

89. *Petition of Davis*, 192 N.Y.S.2d at 174.

90. *Id.* at 176.

91. 216 N.Y.S.2d 384 (N.Y. Sup. Ct. 1961).

92. *Application of Stanton*, 216 N.Y.S.2d at 385.

93. *Id.*

94. 120 N.Y.S.2d 287 (N.Y. Sup. Ct. 1953).

95. *Application of Rosenwasser*, 120 N.Y.S.2d at 289.

96. *Id.* at 288.

97. 140 N.Y.S.2d 279 (N.Y. Sup. Ct. 1955).

98. *Application of Baron*, 140 N.Y.S.2d at 281.

Halpern, President of the Rabbinical Assembly of America and the National Organization of Conservative Rabbis in the United States and Canada, who averred that:

It is my opinion that since Jewish Law is always concerned with respect for the dead and since the purpose of this disinterment is to take the remains of the deceased from a single grave and place it in a family plot where other members of the family will be buried, this is a gesture of added respect for the deceased and is permissible according to Jewish Law.⁹⁹

H. S. Linfield, executive secretary of the Jewish Statistical Bureau, stated the following from the applicable law as written in the religious code: "It is prohibited to remove the dead from one grave to another. However, it is permissible to do so if the removal is to a family plot."¹⁰⁰

In *Herzl Congregation v. Robinson*,¹⁰¹ the court allowed the parents to disinter the remains of the deceased son over the objection of the religious authorities governing the cemetery, but only after concluding that there was a serious conflict as to the tenets governing disinterment.¹⁰² Specifically, the court stated: "[i]n the instant case, there is a serious conflict in the testimony as to whether or not the rules and regulations of the Orthodox Jewish Church would permit the disinterment of a body, particularly in view of the fact that the purpose thereof was to bury it in another Jewish cemetery."¹⁰³

In *Raisler v. Krakauer Simon Schreiber Congregation*,¹⁰⁴ the court allowed the surviving children to disinter the remains of their deceased parents over the objections of the Jewish congregation that had sold them burial rights.¹⁰⁵ The court allowed the disinterment only after determining that the one of the most important rabbis of the Western World had concluded that disinterment under the circumstances did not violate Jewish law.¹⁰⁶ On the issue of disinterment under Jewish law, the rabbi

99. *Id.* at 280.

100. *Id.* (quoting *Yoreh Deah* in 2 CARO CODE, ch. 363, ¶ 1).

101. 253 P. 654 (Wash. 1927).

102. *Herzl Congregation*, 253 P. at 655.

103. *Id.*

104. 47 N.Y.S.2d 938 (1944).

105. *Raisler*, 47 N.Y.S.2d at 939 (observing that the actual cemetery did not object to their disinterment).

106. *Id.* Specifically, the court relied on an arbitration decision by Rabbi Moses Hyamson, and noted his qualifications as follows: B.A., L.L.B., L.L.D. (University of London), who had been the dean of

the Ecclesiastical and Arbitration Board of the United Synagogue of London, England, then the Supreme Jewish Court of the British Empire, . . . the Chief Rabbinate of the British Empire; the author of books, pamphlets and essays including "The Oral Law"

“recognized the right of children to remove to a family burial plot the remains of their parents, regardless of the fact that such family plot contained no burials theretofore,” and that “there is no force to the point made, that a cemetery plot is worthless after one is disinterred, except that the grave may not be used by a child of the deceased, where the disinterment has been made in proper cases.”¹⁰⁷

Finally, in *Currier v. Woodlawn Cemetery*,¹⁰⁸ the court allowed a son to disinter the remains of his deceased mother, but only after concluding that there was no religious opposition.¹⁰⁹ Specifically, the court stated, *inter alia*, “[i]f the deceased had been a member of a faith which forbade disinterment . . . then only compelling considerations would justify disinterment and removal. But the case before us presents no such factors.”¹¹⁰

As the foregoing litany of cases illustrates, disinterment from consecrated ground has never been permitted when it violates the beliefs of the religious denomination at issue. Rather, disinterment has only been allowed when religious beliefs are not relevant or permit the practice. *Application of Sherman*¹¹¹ is the only relevant case that arguably runs counter to the published opinion discussed herein. In that case, a widow was allowed to disinter the remains of her deceased husband and remove them to a family plot.¹¹² Disinterment was allowed under circumstances in which the husband had been a member of a synagogue, and the synagogue and its Rabbi opposed the application.¹¹³ There was no discussion, however, as to which denomination of Judaism was involved, whether that denomination forbade disinterment, or whether the decedent was devoted to it. Rather, disinterment was opposed “on the grounds that there are deed restriction against disinterments and that the application is not made in good faith.”¹¹⁴ Most critically, the court allowed the disinterment because it felt that the bonds of matrimony were stronger than the religious bonds, stating

and “Collatio of Roman and Mosaic Law;” . . . a Professor of Codes of the Jewish Theological Seminary[; the] life Rabbi of the Congregation Orach Chaim; a contributor to Jewish Journals in England and the United States; . . . president of the New York Board of Jewish Ministers[;] . . . [and] a Rabbinical Vice-President of the Union of Orthodox Jewish Congregations of America and Vice-President of the Jewish Conciliation Board of New York, which he had helped to found.

Id. at 939-40.

107. *Id.* at 940.

108. 90 N.E.2d 18 (N.Y. 1949).

109. *Currier*, 90 N.E.2d at 19.

110. *Id.* (citations omitted).

111. 107 N.Y.S.2d 905 (N.Y. Sup. Ct. 1951).

112. *Application of Sherman*, 107 N.Y.S.2d at 906.

113. *Id.*

114. *Id.*

that “[t]he bonds of marriage are strong and to be upheld; separation after death of those who have been joined in matrimony cannot be lightly permitted.”¹¹⁵ As such, *Sherman* appears to be the only published opinion that even arguably elevates the wishes of the next of kin over the interests of the relevant religion.

C. REDUCING A STATUTORY IMPERATIVE TO AN EQUITABLE
CONSIDERATION OF PUBLIC INTEREST: THE CURIOUS TREATMENT
OF SEEMINGLY UNAMBIGUOUS STATUTES

Deference to religion in the disinterment context, as manifest in legal protection from desecration afforded religiously consecrated ground, is not limited to the equitable factors discussed herein. More recently, some state legislatures have bolstered this protection by specifically according statutory rights to those who control religious cemeteries.¹¹⁶ Typically, these statutes provide that once a decedent is interred in a religiously consecrated cemetery the remains cannot be disinterred except in accordance with the rules, regulations, or canons of the controlling religious denomination; that the relevant representation of the religious are the sole judges of these restrictions; and that the rights of the controlling religious entity operate against the next-of-kin.¹¹⁷

Based on the language of these statutes, it would seem that the next-of-kin could not disinter from cemeteries controlled by religious denominations that adhere to rules, regulations, or canons that prohibit disinterment.¹¹⁸ Yet, despite what appears to be a clearly stated statutory right of a religious entity to prohibit disinterment from its cemetery, the courts have not in any way deferred to the statutes. Rather, the courts have considered the statutes nothing more than somewhat relevant to the application of the equitable factors governing disinterment—typically the “interest of the public” factor.¹¹⁹

One prime example of so treating a statute is provided by California. Specifically, Section 7980 of the California Health and Safety Code decrees:

The heirs, relatives or friends of any decedent whose remains have been interred in any cemetery owned, governed or controlled by

115. *Id.*

116. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7980 (West 2007); 10 PA. CONS. STAT. ANN. § 81 (West 2006).

117. *Id.*

118. *Id.*

119. *See, e.g.*, *Ingraffia v. Dougherty*, 29 North. Co. R. 294, 300 (Pa. 1944).

any religious corporation . . . shall not disinter, remove, reinter or dispose of any such remains except in accordance with the rules, regulations and discipline of such religious denomination, society or church. The officers, representatives or agents of the church or religious society shall be the sole judge of the requirements of the rules, regulations and discipline of such religious denomination, society or church.¹²⁰

It is difficult to imagine greater protection afforded consecrated ground than the one mandated by Section 7980. This impression is confirmed not only by the plain meaning of the language noted above, but also by the analysis of the legislative history of Section 7980. The provision was derived from Section 17 of Chapter 312 of the statutes of 1923, which governed removal of remains upon the abandonment of a cemetery.¹²¹ Then, in 1931, the 1923 statute was made a part of the General Cemetery Act, by operation of Chapter 1148, page 2434, Section 28 at pages 2448-49 of the 1931 codification.¹²²

This history was subsequently analyzed by the *Mitty* court.¹²³ Based upon this history, the court concluded that Section 7980 “literally applied to everything in the General Cemetery Act,” including private action for disinterment brought by relatives of the decedent.¹²⁴ The court also noted that the original draft of Section 7980 was prefaced with the phrase “Nothing in this act . . . shall authorize or permit,” that this preface created ambiguity as to whether disinterment was prohibited if opposed by the religious denomination, and that the preface was omitted in the final drafts.¹²⁵

Nonetheless, despite recognizing what it itself termed an unambiguous statute, the court concluded that when a burial has been made in a religious cemetery as described in Section 7980, that section did nothing more than “give[] preference to the rules, regulations and discipline of the church over

120. CAL. HEALTH & SAFETY CODE § 7980 (West 2007).

121. *Mitty v. Oliveira*, 244 P.2d 921, 928 (Cal. Dist. Ct. App. 1952).

122. *Mitty*, 244 P.2d at 928.

123. *Id.*

124. *Id.*

125. *Id.*

the desires of the relatives of the decedent.”¹²⁶ The court also concluded that the statute was nothing more than an expression of a policy.¹²⁷

A second, though subtler, example of this phenomenon is found in Pennsylvania law. Specifically, similar to Section 7980 of the California Health and Safety Code, Pennsylvania statutory laws provides:

Whensoever any property . . . has heretofore been or shall hereafter be bequeathed, devised, or conveyed to any ecclesiastical corporation, bishop, ecclesiastic, or other person, for the use of any church . . . for or in trust for . . . sepulture, . . . the same shall be taken and held subject to the control and disposition of such officers or authorities of such church . . . having a controlling power according to the rules, regulations, usages, or corporate requirements of such church, . . . which control and subject to the rules and regulations, usages, canons, discipline and requirements of the religious body, denomination or organization to which such church . . . shall belong.”¹²⁸

*Datz v. Dougherty*¹²⁹ was the first case in which this statute was applied. The *Datz* court held that a surviving spouse who wished to reinter her husband’s remains so that the entire family could be buried together could not disinter her husband from ground sanctified by the Roman Catholic Church in violation of the tenets of the Church.¹³⁰ In support of the holding, the court focused in part on the equitable factors, and in part on the statute, stating: “The facts themselves necessarily bring into consideration, and most careful consideration, the control of the ecclesiastical laws of deceased’s church over his last resting place. . . .”¹³¹ Ultimately, the court concluded that disinterment could not be allowed because “[u]nder the cases cited pursuant to that act[,] there can be no dispute that church law is paramount in the control of cemeteries,” and that the requirement that “burials are made in ecclesiastical cemeteries subject to the rules,

126. *Id.* Specifically, the appellate court considered, *inter alia*, that burial had been “effected . . . in full conformity with the rules, regulations and discipline of the church,” and concluded that: “this is a case for observance of the policy expressed in section 7980 of the Code, which does not sanction removal except in conformity with the rules, regulations and discipline of the church. *Id.* at 929.

127. *Id.*

128. 10 PA. CONS. STAT. ANN. § 81 (West 2006).

129. 41 Pa. D. & C. 505 (1941).

130. *Datz*, 41 Pa. D. & C. at 513.

131. *Id.* at 506.

regulations, canons, and discipline of the church, must be held to apply to removals as well.”¹³²

As such, the *Datz* court appeared to be relying on the statute in a significant way. However, the importance of the statute appears to have been undermined in *Ingraffia*.¹³³ As discussed previously, *Ingraffia* denied an application for disinterment from ground consecrated by the Roman Catholic Church. Regarding the Pennsylvania statute, the court recognized that:

The rules and regulations, usages, canons, discipline, and requirements of religious denominations or organizations relative to the right of Sepulcher have been written into the law of the State by the Act of June 20, 1936, P. L. 353, section I (10 P.S. 81), and by the decisions of our courts . . . the pertinent canons of the Catholic Church and the pertinent rules and regulations of cemeteries of the Catholic Church, are written into the law of the State by the aforesaid Act of Assembly.¹³⁴

Despite this recognition, the court held that the statute was only one factor to consider in making a disinterment decision, i.e., the factor relating to the interest of the public. Specifically, the court stated:

Reference has already been made to the fact that such restrictions are part of the law of the State and must be considered by a court of equity in passing upon the propriety of a reinterment.

. . . .

The effectuation of plaintiffs’ wishes would not only violate the aforementioned policy of the law, but would also violate the fundamental concept of the sanctity of religious beliefs. To this extent plaintiffs’ wishes run counter to the interests of the public.¹³⁵

132. *Id.* at 513-14; *see also* *Wynkoop v. Wynkoop*, 42 Pa. 293, 303 (1862) (finding a widow could not disinter remains of her deceased husband from a church cemetery when disinterment was opposed by the church because, *inter alia*, the body lay in “consecrated ground” and “was buried with the ceremonies of the church”).

133. *Ingraffia v. Dougherty*, 29 North. Co. R. 294, Pincite (Pa. 1944).

134. *Id.* at 298.

135. *Id.* at 298, 300.

IV. THE RELEVANCE, OR LACK THEREOF, OF THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE

In the middle of the nineteenth century, American courts recognized that disinterment decisions in the United States were the province of civil courts applying equitable principles, and not ecclesiastical courts (or civil courts, for that matter) applying ecclesiastical law.¹³⁶ Though the courts rarely, if ever, specifically invoked the Establishment Clause¹³⁷ as justification, their early holdings are certainly consistent with it, and with general principles of separation of church and state.

The earliest significant American case grounding the disinterment decision in secular, as opposed to ecclesiastical law was *In re Beekman Street*.¹³⁸ In that case, the City of New York condemned an eighteenth century cemetery, and made a lump sum payment to the religious corporation that had been maintaining the grounds.¹³⁹ Litigation arose when the claimant—the daughter of one of the decedents interred in the cemetery—sought a portion of the payment to cover the costs of removing and reintering her father's remains. A decision to indemnify the daughter was ultimately based upon the report of Referee Samuel B. Ruggles. The thesis of the report was that historically, in England, protecting remains was within the jurisdiction of the common law, but the ecclesiastical courts gradually usurped that jurisdiction; as there were no ecclesiastical courts in America, the ancient and rightful authority of the secular courts had to be restored.¹⁴⁰

Forty years later, *In re Donn* reached the same conclusion in an equitable context. As stated earlier, *In re Donn* involved surviving children who sought an order allowing them to disinter the remains of their mother from a Roman Catholic cemetery, which opposed disinterment as against the canons of the church.¹⁴¹ The court ultimately denied equitable relief, i.e., denied a motion to order disinterment, but only after stressing that the Roman Catholic Church had no jurisdiction over the matter.¹⁴² Specifically, the court reviewed the historical English doctrine on this subject, and agreed with the Ruggles report in all relevant respects.¹⁴³ The court then concluded that, in the United States:

136. See *infra* text accompanying notes 138-145; *Removal and Reinterment*, *supra* note 1, § 4.

137. U.S. CONST. amend. I.

138. *Removal and Reinterment*, *supra* note 1, § 4(b).

139. *Id.*

140. *Id.*

141. *In re Donn*, 14 N.Y.S. 189, 189 (N.Y. Sup. Ct. 1891).

142. *Id.* at 190.

143. *Id.*

While we grant to all religious organizations the largest and broadest latitude and liberty to adopt all or any proper rules or regulations, to the end that their votaries may worship God according to the dictates of their conscience, we have jealously watched and resisted any and all attempts on their part to usurp powers or authority outside or beyond their legitimate functions of caring for and administering spiritual affairs.¹⁴⁴

After being first articulated in the nineteenth century, the notion that secular courts applying equitable principles were the sole arbiters of disinterment disputes became entrenched doctrine by the middle of the twentieth century. As stated by the court in *Friedman v. Gomel Chesed Hebrew Cemetery Association of Elizabeth*: “This court is not bound by the ecclesiastical law. That is too well established to need citation of authorities.”¹⁴⁵

While entrenching this perhaps evident doctrine, however, the courts were simultaneously according religious law great deference while making their equitable determinations. Most extreme in this regard is *Ingraffia*.¹⁴⁶ As noted earlier, the court in *Ingraffia* denied an equitable motion for disinterment based in large part on the fact that the canon law of the Roman Catholic Church forbade disinterment. In so holding, the court came very close to literally equating state law with canon law, stating:

The rules and regulations, usages, canons, discipline and requirements of religious denominations or organizations relative to the right of sepulcher have been written into the law of the State by the Act of June 20, 1935, P.L. 353, section 1 (10 P.S. 81); and by the decisions of our courts. The law recognizes and upholds reasonable cemetery regulations where, as here, the cemetery has reserved the right to regulate. Clearly, then, the pertinent canons of the Catholic Church and the pertinent rules and regulations of cemeteries of the Catholic Church, which prohibit disinterment from a Catholic Cemetery to a non-Catholic cemetery, are written into the law of the State by the aforesaid Act of Assembly and the decisions thereunder.

....

144. *Id.*

145. *Friedman v. Gomel Chesed Hebrew Cemetery Ass'n of Elizabeth*, 92 A.2d 117, 118 (N.J. Super. Ct. Ch. Div. 1952).

146. *Ingraffia v. Dougherty*, 29 North Co. R. 294 (Pa. 1944).

The effectuation of plaintiffs' wishes would contravene the ecclesiastical and cemetery restrictions of the Catholic Church. Reference has already been made to the fact that such restrictions are part of the law of the State and must be considered by a court of equity in passing upon the propriety of a reinterment.¹⁴⁷

To a lesser degree, virtually every case discussed herein affords religion the same deference. Even *Friedman*, which, as quoted earlier, considered that it was not necessary to even cite cases in support of the proposition that ecclesiastical law could not control secular courts, stated in the clause immediately subsequent that "it is equally well established that, while not bound by the ecclesiastical law in any given case, the court, in arriving at its decision, should consider the ecclesiastical law and give to it such weight as will bring out an equitable result."¹⁴⁸

Given this verbiage, eventually, perhaps inevitably, one court finally concluded that the deference accorded religion reached an unconstitutional level, and found the entire equitable analysis to be in violation of the Establishment Clause. Thus, in *Wolf v. Rose Hill Cemetery Ass'n*,¹⁴⁹ the plaintiff sought to have her father and sister disinterred from an Orthodox Jewish cemetery and reinterred in a family plot; the cemetery opposed the request on religious grounds.¹⁵⁰ The trial court heard testimony from both Orthodox and Reform rabbis, and from others regarding the role religion played in the lives of the decedents.¹⁵¹ The court then relied on this testimony in applying the four equitable factors, denying disinterment in a way that has come to be expected in religion cases.¹⁵² Specifically, regarding the intentions of the decedents, the court inferred from the testimony of the Orthodox rabbis that the decedent father was an Orthodox Jew, and would therefore not want to be disinterred in violation of Jewish laws.¹⁵³ Regarding the interests of the cemetery, the court concluded that disinterment in violation of Jewish law would have a negative impact on it. Regarding the public interest, the court concluded that desecration of hollowed ground would have a negative impact on "others."¹⁵⁴

147. *Id.* at 298, 300.

148. *Friedman*, 92 A.2d at 118.

149. 832 P.2d 1007 (Colo. Ct. App. 1992).

150. *Wolf*, 832 P.2d at 1007-08.

151. *Id.* at 1008.

152. *Id.* at 1009.

153. *Id.*

154. *Id.* at 1008.

The appellate court reversed and remanded, finding that the analysis of the lower court, which, again, comported with the traditional equitable analysis as applied in cases involving religious decedents, was unconstitutional in that it was based on the resolution of conflicting theological principles, and was therefore inconsistent with the Establishment Clause of the First Amendment as applied to the states by the Fourteenth Amendment.¹⁵⁵ The court reasoned that these Amendments, as applied by the Supreme Court in *Presbyterian Church v. Mary Elizabeth Blue Null Memorial Presbyterian Church*,¹⁵⁶ dictated the disinterment dispute be decided pursuant to “neutral principles of law.”¹⁵⁷ In remanding, the court held that “neutral principles of law” dictated that the traditional equitable analysis be modified so as to consider only: (1) “[t]he intent of the decedent and wishes of the surviving spouse or next of kin;” (2) “[w]hether a written contract between the cemetery and decedent or next of kin exists that discusses rights of removal;” (3) “[l]ength of time interred;” (4) “[t]he practicality of disinterment;” and, (5) “[i]mpact of disinterments on others.”¹⁵⁸

If *Wolf* is correct, virtually every court that rendered a decision involving a religious decedent would have done so pursuant to an analytical framework that also violated the Establishment Clause. For over a century the courts have heard testimony, sometimes conflicting, on the dictates of religious law,¹⁵⁹ and concluded that, as adherents to a religion, decedents would wish their remains were dealt with according to the relevant religious dictates.¹⁶⁰ Consistency of past application, of course, is no reason to perpetuate an unconstitutional analysis. The *Wolf* formulation of the equitable factors, however, presents difficulties of its own. From an evidentiary perspective, it seems impossible to determine the intent of the religious decedent without referring to the religious precepts by which he or she lived. Indeed, if the interment decision were guided by those precepts, refusing to consider them in the context of disinterment would result in a baseless finding regarding the intent of the decedent. It would be equally impossible, or baseless, to determine the impact of disinterment on others if the “others” are congregants of the decedent for whom the impact of the disinterment of the decedent is also shaped by the same religious precepts.

From a constitutional perspective, the equitable courts do not appear to be trying to resolve disputed issues of religious doctrine, in violation of the

155. *Id.* at 1009.

156. 393 U.S. 440 (1969).

157. *Wolf v. Rose Hill Cemetery Ass’n*, 832 P.2d 1007, 1009 (Colo. Ct. App. 1992).

158. *Id.* (internal citations omitted).

159. *See supra* text accompanying notes 13-115.

160. *Id.*

Establishment Clause. Rather, while they are recognizing that different denominations of a religion have different views regarding disinterment, they are simply trying to determine to which denomination the decedent belonged. In this sense, the equitable courts may be walking a fine line between the Establishment Clause and the Free Exercise Clause.¹⁶¹

On the latter point, a few courts, falling on the other side of the line as compared to *Wolf*, have suggested that the Free Exercise Clause actually requires the equitable courts to consider the religious views of the decedent. In the context of religious opposition to an autopsy the court in *Atkins v. Medical Examiner of Westchester County*,¹⁶² suggested this by stating:

Freedom of religion which necessarily includes the right to follow the tenet of one's faith is one of the most basic and fundamental concepts of a democratic form of government. So vital is this right that it has been embodied in and remains guaranteed by both our state and federal constitutions.

....

The individual's right of free choice in such an important area as religion must prevail over the State's curiosity as to the cause of death. The bereaved have a right to proclaim that a body once laid to rest should no longer be disturbed—that the dead be allowed to rest in peace and that the body be returned to its Maker in the form and manner best calculated to insure His favor.¹⁶³

Another, in the context of disinterment, was *Ingraffia*, which stated: the decedent requires us to keep inviolate that faith even in his last repose. To deny to the dead the faith which sustained them in life is to deny to the living the faith that sustains them in death. In this sense the fundamental American ideal of religious freedom transcends the confines of the grave.¹⁶⁴

*Tamarkin v. Children of Israel Inc.*¹⁶⁵ is the decision that has gone the furthest in making the Free Exercise Clause relevant to the disinterment of a religious decedent. In *Tamarkin*, an Orthodox Jewish congregation alleged that applying a state statute granting the next of kin the right to disinter was “contrary to the religious beliefs of the Orthodox Jewish religion and [was],

161. U.S. CONST. amend. I.

162. 418 N.Y.S.2d 839 (N.Y. Sup. Ct. 1979).

163. *Atkins*, 418 N.Y.S.2d at 840.

164. *Ingraffia v. Dougherty*, 29 North Co. R. 294, 300 (Pa. 1944).

165. 206 N.E.2d 412 (Ohio Ct. App. 1965).

therefore, an unconstitutional interference with their religious beliefs.”¹⁶⁶ The court determined that the constitutional issue would only be before it if the congregation could prove that the religious beliefs and wishes of the decedents forbade disinterment and were therefore contrary to the wishes of the next of kin to disinter.¹⁶⁷ In determining that the decedents did not hold such contrary religious views, the *Tamarkin* court considered the very evidence that the *Wolf* court deemed in violation of the Establishment Clause, *to wit*, conflicting views regarding a particular tenet of the Jewish religion, Rabbinical testimony, and the personal religious beliefs of the deceased.¹⁶⁸

Ultimately, when the doctrine of and notions stemming from the Establishment Clause and the Free Exercise Clause are balanced, the analysis returns to the traditional equitable one. As summarized by the court in *Tamarkin*:

The . . . cases hold that ecclesiastical law is not binding on a court, but it may be competent evidence to show customs and wishes of those who observe its mandates. These cases seem to turn on the fact that the deceaseds were devout members of their respective religions, and the presumption would be that their wishes were that their remains should be treated in accordance with the rules of their religion.¹⁶⁹

V. CONCLUSION

For over a century, the courts in the United States have been proclaiming that disinterment decisions are the province of civil, as opposed to ecclesiastical, courts. While this may be true from a constitutional and general jurisprudential perspective, the fact remains that religion, when relevant, completely controls the decision to disinter. While this phenomenon may raise Establishment Clause issues, religion appears destined to maintain its controlling role nonetheless.

¹⁶⁶ *Tamarkin*, 206 N.E.2d at 417.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 417-18.

¹⁶⁹ *Id.* at 415.
